United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
FREDERICK E. WEINBERG

76-1118

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

—against—

JEROME MACKEY and WILLIAM NELSON,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT JEROME MACKEY

FREDERICK E. WEINBERG
Attorney for the
Defendant-Appellant
515 Madison Avenue
New York, New York 10022
(212) PL 2-1720

FREDERICK E. WEINBERG
Of Counsel

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JEROME MACKEY and WILLIAM NELSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT JEROME MACKEY

Appellee's Brief, p. 4:

Appellee states that the agreement between Taylor, Nelson and Mackey had contemplated that the salesmen would use a pitch "which was similar to that previously used by Taylor."

There was no such testimony (237). While there was a discussion concerning the sales pitch which Taylor had previously used when selling for a firm called Economy, the parties did not contemplate the use of that same sales pitch in the proposed venture for MDI (237). In fact, the implication was to the contrary: since it was acknowledged that the Economy sales pitch had included misrepresentations which had created problems (id.). Appellee's further statement that Taylor told Mackey and Nelson "that they would be selling duplicated tapes, which might be illegal"

is also an incorrect reference to what was said. The actual testimony was that there was a discussion "of selling duplicating tapes in the event we could do this in the State of New York" (237). That qualifying condition had succeeded the recognition that the legality of selling duplicated tapes differed from State to State, so that an examination of the New York law would be necessary (236).

Appellee's Brief, p. 5:

Appellee states that in the second meeting between the three men Mackey said that "he had investigated the legalities of duplicate tape sales and found it only to be a civil offense," referring to (239).

An objective reading of the actual testimony establishes its meaning to have been that selling duplicated tapes was not a criminal offense under the New York business law, but, at the most, a civil offense and was a practice which might receive approval from the New York State Attorney General (239). Beyond that, however, there was testimony of Mackey's own position that duplicated tapes would not be sold unless a customer were to express his willingness to accept them in the place of those ordered (279-80).

Appellee's Brief, pp. 5, 14:

Appellee chides Mackey for his unwillingness, at the time of the agreement between the three men, to anticipate the problems which might arise from the obligation to buy back tapes and equipment from dissatisfied customers.

It was Mackey's position that, since the "buy back" obligation would involve simply the corporation, there was no need for the three men "to worry about it" at that time (245). There was no implication that a "buy back" obligation, if entered into, would be dishonored (id.).

Appellee's Brief, p. 8:

Appellee states that Mackey had approved Fisher's promotional literature.

The promotion material referred to by Appellee is set forth on page 8 of his Brief. It contains nothing which could be characterized as fraudulent. While the record contains other promotional literature which Fisher had prepared, none of that literature could even remotely be characterized as fraudulent and Appellee does not make such a claim.

Appellee's Brief, p. 7:

Appellee states that the sales campaign and literature proposed by Fisher had been discussed in conferences at which Nelson and Taylor (sic) were present.

While that statement is correct, it will be noted that Mackey was not present at any of those discussions (570-571). Appellee admits that Mackey "was not a party to

the Fisher-Nelson-Taylor discussions concerning Fisher's sales campaign" (Appellee's Brief, p. 14, lines 9-11). In order, however, to escape the implications from Mackey's non-participation in the conferences with Fisher, Appellee states that Mackey had known of Fisher's propensity for misrepresentation. In that way, Appellee causes it to appear that Mackey had knowingly consented to the hiring of a liar. What Appellee has failed to state to this court, however, is that Mackey had refused to give his consent to the hiring of Fisher until after Taylor had first assured him that he would be able to control Fisher's propensity for misrepresentation (275, 278).

Appellee's Brief, p. 14:

Appellee states that Mackey knew that Fisher's "singers' list" (the names of MDI customers who were prepared to vouch for the desirability of tape routes which they had purchased) was padded.

That statement finds no support in the record. If, in fact, there had been anything improper about the "singers' list" which Fisher had prepared, there was no testimony that Mackey knew of it.

Appellee's Brief, p. 9:

Appellee states that "Taylor kept Mackey informed about the progress of the business (316, 320)."

The testimony referred to was that Mackey was informed from time to time that there were "a lot of sales" (316)

and that "business was good" (320). Such reports may not be treated as the equivalent of information of a practice of making fraudulent sales.

Appellee's Brief, p. 10:

Appellee states that Miss Ciro, the MDI secretary, had overheard Mackey and Nelson discussing a transfer of MDI assets to Neltay Corporation in order to render MDI judgment proof.

In the first place, Miss Ciro acknowledged that she was not certain whether Mackey had been a participant in such a conversation (795-96). Apart from that, however, that alleged conversation was stated by her to have taken place in December (793) which would deprive it of the value apparently claimed for it. While the contemplation of a fraudulent transfer is, of course, improper and may even under certain circumstances constitute a crime, it was not the crime charged in the indictment. Nor would the discussion of a fraudulent transfer in December point to the devising of a wholly different fraudulent plan during the preceding April.

Appellee's Brief, p. 14, unfinished paragraph at the foot of the page:

Appellee attempts to explain the verdict (which had limited Mackey's guilt to the period which immediately followed October 8th, 1972) by stating that it was during that period that Mackey "was informed of the difficulties that Taylor was having handling complaints."

This position of the Appellee depends upon several unjustifiable assumptions. One assumption is that a great number of customer complaints should give rise to an inference that those customers had been defrauded. It is common experience, however, that such complaints do not bespeak fraud. They are likely to occur whenever there is reason to believe that complaints may produce restitution of losses, however originating. A second improper assumption is that, if it were to be assumed that Mackey should have suspected the operation to have been fraudulent, one of two consequences must follow: either that the knowledge imputed to him in October established him to have been guilty of a plan to defraud during the prior April, or that some subsequent inaction of his made him guilty under the indictment, notwithstanding that he had not himself devised any fraudulent scheme.

Any attempt to rationalize this verdict by what Mackey might have come to suspect in October must fail. Whatever he might have learned at that time, it could not have rendered him guilty, retroactively, of having devised a fraudulent scheme in April. Nor may he, in the alternative, be convicted of subsequently drifting through the consequences of a fraudulent scheme which had not been of his own devising. The terms of the indictment forbid it.

Dated: June 7, 1976

Respectfully submitted,

FREDERICK E. WEINBERG
Attorney for Appellant Mackey

FREDERICK E. WEINBERG
Of Counsel

Service of three (3) copies of the within Reply Brief
is admitted this 8th day of June 1976

RECEIVED
U.S. ATTORNEY
JUN 8 11 47 AM '76
EAST. DIST. N.Y.

GROSBY-LODER PRESS, INC., 95 Morton St., New York, N. Y. 10014 BE 3-2336
(76-607—51525)